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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. ~~74-~~98

JOHN MICHAEL DONNER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner John Michael Donner respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on May 3, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, is set forth as Appendix A hereto. No opinion was rendered by the District Court for the Southern District of Indiana.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on May 3, 1974. The Court of Appeals denied petitioner's timely petition for rehearing on July 10, 1974; this Petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner was convicted (i) of a "bifarious" conspiracy, one which included as its alleged objects both illegal conduct and conduct protected under the First Amendment, and (ii) of the act of vandalism which allegedly formed the illegal object of the conspiracy. The questions presented are:

(1) Whether affirmance of petitioner's conspiracy conviction, even though some of the objects of the alleged conspiracy were constitutionally protected conduct, is in conflict with *Stromberg* v. *California,* 283 U.S. 359 (1931), and *Street* v. *New York,* 394 U.S. 576 (1969).

(2) Whether *Stromberg* and *Street* permit affirmance of petitioner's substantive convictions, even though those convictions may have been based only upon his conviction of a bifarious conspiracy some of the objects of which were constitutionally protected conduct.

STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution; 18 U.S.C. § 371; 18 U.S.C. §1361; 18 U.S.C. § 2071(a); and 50 App. U.S.C. § 462(a) are set forth as Appendix B hereto.

STATEMENT OF THE CASE

The Events In Issue. On the night of October 31, 1969, acts of vandalism occurred at the Indianapolis offices of the Marion County, Indiana Selective Service System. (Tr. 44-45, 56.)(1) Early the next morning, a police officer discovered the damage. He also found taped to the office door a typed statement, over the name "Beaver 55,' explaining that the vandalism was "an attempt to call to the attention of the American people the extent to which the government is betraying the ideals . . . on which this country was founded" and stating that "[i]n due time we will reveal our identities." (Tr. 43-45, 52-53.)

On November 20, 1969, all eight of the defendants below, including petitioner, took part in a press confer-

(1) References to the proceedings below are to the record on appeal, and are in the form "R. ....." with regard to pleadings and other papers, and "Tr. ....." with regard to the transcript of petitioner's trial.

ence in Indianapolis. Defendant Paul Mack opened the conference by introducing himself and the other seven defendants, and reading a prepared statement (signed by all eight) which said in pertinent part (Tr. 589):

> "We are the Beaver 55. . . . We are together in our actions, in our love and our responsibility—a community of active resistance. We claim responsibility for the actions against the Selective Service offices in Indianapolis, Indiana on October 31.
>
> "Some of us completely destroyed . . . draft files . . . in 44 local boards in the Indianapolis Metropolitan Area."

A lengthy question-and-answer session followed. (Tr. 591-612.) At varying lengths, all but two of the defendants (including petitioner) spoke, primarily about their opposition to war and then-current Government policy. Most used "we" in referring to the October 31st vandalism; none specifically disclaimed participation in it. The particular individuals committing the vandalism, however, were not identified.

The Proceedings In The District Court. All eight press conference participants were subsequently named in a four-count indictment charging each with conspiracy to violate 18 U.S.C. § 1361, 18 U.S.C. § 2071, and 50 App. U.S.C. § 462(a) (Count I), and with substantive violations of each of those statutes (Counts II, III, and IV).[2]

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(2) 18 U.S.C. § 1361 (which the District Court struck from the conspiracy count before the trial began, Tr. 6-9) proscribes "depredation" against "property of the United States." 18 U.S.C. § 2071(a) concerns "mutilat[ion]" of any "book, paper, document, or other thing, filed . . . in any public office, . . . of the United States." 50 App. U.S.C. § 462(a) deals with persons who "hinder or interfere . . . in any way, by force or violence or otherwise," with the administration of the Selective Service Act. Although 50 App. U.S.C. § 462(a) includes conspiracy to "hinder or interfere," the conspiracy count of the indictment was based upon 18 U.S.C. § 371.

Count I labeled the Indianapolis vandalism "a part" of the conspiracy charged.

At the trial, the Government's proof as to petitioner consisted only of the two written statements described above and of the press conference transcript, which was read aloud to the jury.

The Government did not attempt to prove that petitioner committed the Indianapolis vandalism, or that he joined the "Beaver 55" before those acts occurred. Instead, both the Government and the District Court took the position:

(a) that the alleged conspiracy continued long after the Indianapolis vandalism, and included the November 20, 1969 press conference, since one of the objects of the conspiracy was "propaganda" against the Vietnam War and the draft;

(b) that defendants could validly be convicted of conspiring to "exploit" the Indianapolis vandalism for publicist purposes; and

(c) that any defendant could be convicted of the vandalism whether or not he or she participated in it, and whether or not he or she joined the alleged conspiracy after that time, since "you don't have to be there" to be substantively guilty and since a defendant who joined the conspiracy at any time before its termination could be held liable for all acts committed during its course.

Pertinent excerpts from the comments of the District Court and the Government during trial, from the District Court's instructions, and from the Government's closing argument are set forth as Appendix C hereto.

The jury convicted all eight defendants on all four counts; on July 8, 1970, the District Court sentenced petitioner to four years' imprisonment and a fine.[3]

The Proceedings On Appeal. After the oral argument in this case, another panel of the Seventh Circuit Court of Appeals decided *United States* v. *Baranski*, 484 F.2d 556 (7th Cir. 1973), which held 50 App. U.S.C. § 462(a) unconstitutional because its proscription of conduct "hindering" enforcement of the Selective Service Act by force or violence "or otherwise" interfered with First Amendment rights.[4] The opinion of the Court of Appeals in this case, issued 17 months after oral argument herein and 9 months after *Baranski* was decided, raised *sua sponte* the question whether *Baranski* was applicable. The panel concluded that, while *Baranski* required reversal of petitioner's (and his co-defendants') convictions under

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(3) There is some confusion concerning the sentences. As to Count I, the transcript (Tr. 1465), the Judgment (R. 87), and the Court of Appeals (App. A at 2a), agree that each defendant received a 4-year prison term. As to Count II, the Court of Appeals found that each defendant was fined $5,000; the transcript, however, shows that each defendant was fined $500 and sentenced to a 4-year concurrent prison term, and the Judgment shows that each defendant was fined $5,000 and sentenced to a concurrent 4-year term. As to Count III, both the transcript and the Judgment reflect a further concurrent sentence of 3 years, the maximum under 18 U.S.C. § 2071; the Court of Appeals, however, concluded that concurrent 4-year sentences were imposed. As to Count IV (on which the Court of Appeals reversed all defendants' convictions), all sources agree that another concurrent 4-year term was imposed.

(4) No petition for rehearing, and no petition for certiorari, was filed by any party in *Baranski*. In *United States* v. *Spock*, 416 F.2d 165, 173 n.20 (1st Cir. 1969), the Court of Appeals for the First Circuit upheld the constitutionality of a somewhat different aspect of 50 App. U.S.C. § 462(a).

Count IV, the conspiracy convictions under Count I were not affected. App. A at 9a. The panel distinguished *Baranski,* as to Count I, on the sole ground that here, but not there, defendants had been convicted on the substantive counts. That, it reasoned, justified rejection of the rule of *Stromberg* v. *California,* 283 U.S. 359 (1931), and *Street* v. *New York,* 394 U.S. 576 (1969), in favor of the rule that conspiracy convictions should be upheld "so long as any one of the objects of the conspiracy is unchallenged." App. A. at 9a.

REASONS FOR GRANTING THE WRIT

This case involved two "bifarious" charges. The conspiracy charged in Count I, by virtue of the "continuing conspiracy" theory adopted by the Government and the District Court, included as its alleged objects both illegal conduct (the Indianapolis vandalism) and conduct protected by the First Amendment (the press conference and "propaganda" aims stressed by the Government at the trial and on appeal). Compare *United States* v. *Spock*, 416 F.2d 165, 172 (1st Cir. 1969). Equally, the violation of 50 App. U.S.C. § 462(a) charged in Count IV, and included in Count I as one of the alleged objects of the conspiracy, concerned hindrance of the Selective Service System both "by force" and "otherwise", the latter phrase potentially including "propaganda" in the same fashion as Count I. *United States* v. *Baranski*, 484 F.2d 556, 560-62 (7th Cir. 1973). Since *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931), this Court has repeatedly held that in such cases the Government may not uphold a general verdict of guilty merely by showing that the verdict *might* have been based on the *unprotected* portion of the conduct challenged. Rather, the Government must prove that the conviction *was not* based on an *impermissible* ground. *Williams* v. *North Carolina*, 317 U.S. 287, 292 (1942); *Cramer* v. *United States*, 325 U.S. 1, 36 n. 45 (1944); *Street* v. *New York*, 394 U.S. 576, 585-87 (1969); *Bachellar* v. *Maryland*, 397 U.S. 564, 570-71 (1970). That rules applies to conspiracy charges just as it does to substantive charges. *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957).

The Court of Appeals applied that rule in reversing petitioner's conviction under Count IV. App. A at 9a-10a.

Yet it refused to apply that rule—and, indeed, applied an exactly opposite rule—both to petitioner's conviction under Count I and to his convictions under the remaining substantive counts. That refusal, we submit, cannot be justified, and effects "an ominous expansion of the accepted law of conspiracy." *Krulewitch* v. *United States*, 336 U.S. 440, 455 (1949). Because the decision below conflicts seriously with the prior decisions of this Court in an important area of federal criminal law, petitioner requests that this Court grant certiorari to review that decision.

I.

BECAUSE IT IS IMPOSSIBLE TO TELL WHETHER PETITIONER WAS CONVICTED UNDER COUNT I WHOLLY OR PARTIALLY ON THE BASIS OF PROTECTED CONDUCT, STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931), AND STREET v. NEW YORK, 394 U.S. 576 (1969), REQUIRE REVERSAL. THE CONTRARY RULING OF THE COURT OF APPEALS EFFECTS AN UNWARRANTED EXPANSION OF FEDERAL CONSPIRACY LAW.

That the District Court and the Government submitted a "bifarious" conspiracy to the jury is clear from Appendix C hereto, from the opinion of the Court of Appeals (App. A at 11a-12a), and indeed from the Government's lengthy argument on appeal that the scope of the conspiracy "included the exploitation" of the Indianapolis vandalism "by public notices . . . and explanations to the American people . . ., and [that] press conferences were a part of the original conspiratorial agreement."(5) The District Court thought "propaganda" a major object of the conspiracy, if not indeed its very purpose. App. C at 25a, 27a. The Government went even further, arguing to

(5) Govt. Br. on Appeal 18.

the jury not only that defendants could be convicted simply and solely for participating in a press conference, but also (in response to the argument that the press conference was insufficient evidence of guilt) that (App. C at 32a):

> "If you find them not guilty on that basis, then you are joining the conspiracy; he [defense counsel] is asking you to join in the conspiracy of the Beaver 55."

And the District Court instructed the jury that the November 20th press conference could be part of a continuing conspiracy to interfere with the draft (App. C at 40a); that any person joining the conspiracy at any time before its termination was "as guilty as if he had been one of the . . . originators" (App. C at 38a-39a); that each conspirator was the agent of every other (App. C at 36a); and that the acts of any conspirator, in furtherance of the conspiracy and during its existence, were evidence against all (App. C at 39a).

The alleged "propaganda" branch of the conspiracy, however, was protected by the First Amendment. *Bond* v. *Floyd*, 385 U.S. 116, 133 (1966); *Brandenburg* v. *Ohio*, 395 U.S. 444, 447-48 (1969); see also *Scales* v. *United States*, 367 U.S. 203, 227 (1961), and *Noto* v. *United States*, 367 U.S. 290, 299-300 (1961).(6)

The Government offered no evidence against petitioner other than the two "Beaver 55" written statements and

(6) It is not clear whether the Court of Appeals fully recognized this point. Although conceding that the press conference was "constitutionally protected," the Court held that it "may nevertheless be an overt act in a conspiracy charge." App. A at 11a-12a. Since acts occurring after completion of a conspiracy are not "overt acts", however, see *Bollenbach* v. *United States*, 326 U.S. 607, 611 (1946); *United States* v. *Varelli*, 407 F.2d 735, 743 (7th Cir. 1969), the only conspiracy in which the press conference could be an overt act would be one to propagandize—which is "constitutionally protected."

the November 20th press conference, which was read to the jury. It made no attempt to show when, or why, petitioner joined the Beaver 55. Even conceding *arguendo* that (in the teeth of two unrebutted alibi witnesses, Tr. 850-52, 868-70) the jury might possibly have convicted petitioner on the theory that his remarks at the press conference constituted an admission of his participation in the illegal breach of the conspiracy, the jury might equally well have concluded—as the Government and the District Court invited it to do—that his participation in the press conference *per se* sufficed to convict him under Count I. Under those circumstances, *Stromberg* and *Street* require reversal.

The Court of Appeals, however, App. A at 9a, adopted a diametrically opposite rule: "convictions on a conspiracy count are not affected 'so long as any one of the objects of the conspiracy is unchallenged.'" Since the jury had also convicted petitioner on a substantive count involving the Indianapolis vandalism, it held, the jury might have convicted him of the "right" conspiracy under Count I. App. A at 8a-9a. That reasoning ignores the very danger of "intertwining" protected and unprotected conduct which underlies the *Street-Stromberg* rule. *Street* v. *New York*, 394 U.S. 576, 588 (1969).(7) Nothing in the opinion of the Court of Appeals explains why the jury, accepting the invitation of the Government and the District Court, might not have reasoned thus:

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(7) The reasoning of the Court of Appeals also conflicts with its own action on Count IV. That Count presented the same duality (between illegal and protected conduct) as did Count I. If conviction under 18 U.S.C. §2071 (Count III) suffices to avoid *Street* on Count I, no reason appears why the same result does not follow under Count IV. Yet the Court of Appeals—relying upon *Street*—reversed Count IV. App. A at 10a.

1. Petitioner took part in the press conference. Since the press conference was part of the conspiracy, he is therefore guilty of conspiracy.

2. Since a conspirator is guilty of all acts done by his co-conspirators (regardless of when he joined the conspiracy), and since some of the defendants committed the Indianapolis vandalism, petitioner is therefore guilty of that vandalism.

That reasoning, however, violates not only *Street* and *Stromberg* but also *Yates* v. *United States*, 354 U.S. 298, 311-12 (1957), and *Levine* v. *United States*, 383 U.S. 265, 266 (1966). To uphold a conviction which may have been based upon such reasoning is to overrule all of those cases and to effect an unwarranted, and dangerous, expansion of federal conspiracy law at the expense of First Amendment rights.

II.

PETITIONER'S "SUBSTANTIVE" CONVICTIONS UNDER 18 U.S.C. § 1361 AND 18 U.S.C. § 2071 RAISE THE SAME STREET-STROMBERG PROBLEM AS DOES HIS CONSPIRACY CONVICTION UNDER COUNT I.

As to petitioner, the only evidence offered by the Government on the substantive counts was that which it offered on the conspiracy count: the two "Beaver 55" written statements and the contents of the November 20th press conference. Against that evidence, petitioner offered the unrebutted testimony of two witnesses that he was several hundred miles away from Indianapolis when the Indianapolis vandalism (the subject of all of the substantive charges other than Count IV, on which the Court of Appeals reversed petitioner's conviction) occurred. (Tr. 850-52, 868-70.)

That presents, together with its factual simplicity, substantial legal difficulty. Even conceding *arguendo* that the jury might have convicted petitioner under Counts II and III on the theory that he had admitted personal participation in the Indianapolis vandalism by his press conference statements—a theory deemed unimportant by the District Court, App. C at 45a—it is at least equally likely that the jury adopted the approach (urged by the Government both at trial and on appeal) that "evidence of being part of a conspiracy is sufficient to support conviction on substantive offenses committed in furtherance of the conspiracy."[8] See *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946).

We have shown, however, that the conspiracy of which petitioner was convicted was bifarious, and that petitioner's conviction of conspiracy violates *Stromberg* v. *California*, 283 U.S. 359, 367-68 (1931), and *Street* v. *New York*, 394 U.S. 576, 585-587 (1969). Because we cannot surely say that the jury did not convict petitioner under Counts II and III merely because it had convicted him of conspiracy under Count I, *Street* and *Stromberg* also

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(8) Gov't Br. on appeal 18. The Court of Appeals, App. A at 14a, expressed some doubt concerning whether the jury had been instructed on that theory. The Government, however, had no doubt that such an instruction was given: "*Nye* & *Nissen* [v. *United States*, 336 U.S. 613, 618 (1949)] requires an instruction to the jury on that theory, which the trial court did in its given Instruction 33." The District Court also had no doubt on that score. App. C at 45a. Trial counsel for petitioner, having failed to persuade the court that the protected branch of the alleged conspiracy should not be submitted to the jury, felt compelled in closing to mention the *Pinkerton* rule (Tr. 1312): "Three people could have been in Chicago and met somewhere and conspired and agreed to do these illegal things at the Wulsin Building, and if others did it, they are responsible." All parties were correct, since the trial court instructed the jury that the acts of any conspirator were the acts of all. App. C at 39a.

taint those substantive convictions. With them, as with Count I, it is not only possible but likely that the jury based petitioner's conviction solely on his participation in the November 20th press conference. That course, after all, required the jury to take only one additional step—that of remembering "you don't have to be there", because the acts of one conspirator are the acts of all. Particularly is such reasoning likely in view of its outright adoption by the Government on appeal (see p. 13, n. 8, *supra*), and the District Court's explicit statement that the jury might well have so reasoned, App. C at 45a. Affirmance of petitioner's substantive convictions, then, violates *Street* and *Stromberg* fully as much as affirmance of his conspiracy conviction.

The fatally flawed reasoning in which the jury was invited to indulge as to all of those convictions, and the danger of permitting that reasoning to stand uncorrected, are analyzed at pages 11-12, *supra*. Those points have added force here, because the only evidence concerning petitioner's substantive guilt, apart from that offered against him under Count I, was the unrebutted testimony that petitioner was several hundred miles from Indianapolis when the Indianapolis vandalism occurred.

A further point, however, must be made. Under the circumstances here, the Court of Appeals' affirmance of petitioner's substantive convictions violated *Pinkerton* v. *United States*, 328 U.S. 640, 647-48 (1946), in addition to *Street* and *Stromberg*. The premise of *Pinkerton*, as of *Levine* v. *United States*, 383 U.S. 265, 266 (1966) and *United States* v. *Peoni*, 100 F.2d 401, 403 (2d Cir. 1938) (L. Hand, J.), is that a conspirator is liable only for the acts of his co-conspirators which fall within "the fair import of the concerted purpose or agreement as he understands it."

We have shown that the alleged "concerted purpose" in this case included both protected and illegal conduct, and that the jury may have convicted petitioner of conspiracy because he engaged in wholly or partially protected conduct. We cannot say with assurance—much less the certainty required by *Stromberg* and *Street*—that the jury did not convict petitioner on Counts II and III solely because it convicted him of that bifarious conspiracy. Under such circumstances, affirmance of those substantive convictions radically extends the principle of *Pinkerton*. The failure of the Court of Appeals to apply *Street* and *Stromberg* to petitioner's substantive convictions, then, results not only in the unwarranted expansion of federal conspiracy law discussed above in the context of Count I, but also in an equally unwarranted expansion of the *Pinkerton* doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1972 — SEPTEMBER SESSION, 1972

No. 18812
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JOHN MICHAEL DONNER, JANE ANNE KENNEDY, CONNIE GRUBBS MCNAMARA, ROBERT MARTIN MCNAMARA, PAUL JOSEPH MACK, THOMAS RHOLAND TROST, and JAMES DAVID WILLIAMS,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. IP 70-CR-2
CALE J. HOLDER,
Judge.

ARGUED NOVEMBER 3, 1972 — DECIDED MAY 3, 1974

Before SWYGERT, *Chief Judge*, HASTINGS, *Senior Circuit Judge*, and PELL, *Circuit Judge*.

PELL, *Circuit Judge*. This is an appeal from a judgment of conviction entered in the Southern District of Indiana against eight defendants named in a four-count indictment. It has been brought to our attention that the defendant Trost is deceased. Subsequent to the conviction, the defendant Muiert became (and apparently remains) a fugitive. We consider the appeal of the remaining six defendants.

Count I of the indictment as returned by the Grand Jury charged the defendants with a conspiracy to violate

18 U.S.C. §1361,[1] 18 U.S.C. §2071,[2] and 50 U.S.C. App. §462(a),[3] all in violation of 18 U.S.C. §371, the conspiracy statute.[4] This count alleged, *inter alia*, that it was part of the conspiracy that the defendants would enter the Marion County, Indiana, headquarters of the Selective Service System in Indianapolis, Indiana, "and would remove and thereupon deface, mutilate, obliterate and destroy official files and records of the Selective Service System contained therein by ripping, tearing and applying black paint to said official files and records."

Counts II, III, and IV respectively charged the defendants with substantive violations of 18 U.S.C. §1361, 18 U.S.C. §2071, and 50 U.S.C. App. §462(a), the three sections of the statutes which were originally denominated as the objects of the Count I conspiracy.

All the defendants were found guilty in a jury trial on each count. Each defendant was sentenced to an executed sentence of four years on Counts I, III, and IV, the terms to run concurrently, plus a fine for each defendant of $5,000.00 under Count II.

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[1] 18 U.S.C. §1361 reads:

"Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof, or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or imprisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both."

[2] 18 U.S.C. §2071 reads in pertinent part:

"(a) Whoever willfully and unlawfully . . . mutilates, obliterates, or destroys, or attempts to do so, . . . any record, proceeding, map, book, paper, document, or other thing, filed or deposited . . . in any public office . . . of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both."

[3] 50 U.S.C. App. §462(a) reads, in pertinent part, that

". . . any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title . . . or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

[4] The allegation in Count I that defendants had conspired to violate 18 U.S.C. §1361 was excised from the indictment by the district court because the dollar amount of the damage to government property was not specified in the count.

I

Some time during the evening of October 31, 1969, or during the early morning hours of the following day, the Marion County, Indiana, headquarters of the Selective Service System was the subject of a destructive visitation. During the course thereof, some 135,000 registration cards were scattered about the office; file drawers were pulled open and the contents, including data furnished by registrants, were indiscriminately thrown about; numerous documents were torn and mutilated; and large ledgers containing classification records had had either the pages torn apart completely or the books had been fanned open and sprayed with black paint. Repairing the damage took until March 1970 at a cost of approximately $30,000.

The damage was first discovered by an Indianapolis policeman at approximately 6:00 A.M. on November 1. He had responded to a radio call, which had followed a telephone call a short time earlier to a newsman at a local radio-television station. Later the same day this newsman, as well as other persons in news media in the area, received by special delivery mail copies of a statement which had been affixed to the Selective Service office door at some time prior to the arrival of the policeman.

The statement generally was critical of the involvement of this country and its resources in foreign wars, particularly that in Vietnam, and referred to various claimed governmental discriminations. In part, the statement read as follows:

> "'The destruction of the records of the Indianapolis draft boards is an attempt to call to the attention of the American people the extent to which the government is betraying the ideals of justice and freedom embodied in the documents on which this country was founded.
>
> " . . . . .
>
> ". . . . This is not the first time that a draft board is destroyed by Americans concerned about the future of the nation. We hope that this action will encourage many others to take all the necessary steps to make this nation a republic of, by, and for the people.

"In due time we will reveal our identities. We are not criminals ashamed of our action. We are sure that the destruction of draft records has some of the qualities inherent in the actions of our founding fathers. We trust that the American people will vindicate us.

Beaver 55"

It appears that all of the defendants (the eight named in indictments subsequently issued) were in Washington, D.C., on the weekend of November 14-16, 1969, where they participated in a press conference at which they may have released materials identifying themselves as the Beaver 55. Inasmuch, however, as this appearance does not seem to loom large in the contentions of the parties, we will proceed to the city of Indianapolis, where a press conference was held on November 20, 1969. All eight defendants were present and sat at a table in the front of a room before some 40 persons, half of whom were from the news media.

Defendant Mack, after welcoming those in attendance, said, "I will first introduce the members of the group and then I will read a statement that we have prepared and then the whole group will be open to questions from the press."

After the introductions by name and address, Mack read a statement which in part was as follows:

"We are the Beaver 55. We are single and married, workers and students, young and old. We started from different parts of the country and ended up together in Chicago. We are together in our actions, in our love and our responsibility—a community of active resistance. We claim responsibility for the actions against the Selective Service offices in Indianapolis, Indiana, on October 31.

"Some of us completely destroyed 1-A and 1-A delinquent draft files and ledger books in 44 local boards in the Indianapolis Metropolitan Area.

"We have done this because, we are not blinded by the lies that corporations attempt to pawn off on us.

• • •

"We have done this because, we will no longer tolerate this madness. We will no longer tolerate any form of conscription to kill. We will no longer tolerate the Christians' 'just war', the liberals' cries for 'honorable peace.' We put our hope in life, and our lives in hope and will continue to actively resist any system which obstructs those goals.

• • •

"These actions must continue; the spirit of the people will not be overcome.

"PEACE, Michael Donner, Jane Kennedy, Paul Mack, Connie Grubbs McNamara, Marty McNamara, Jo Ann Mulert, Tom Trost, David Williams."

The press conference then continued in question-and-answer form. All eight of the persons whose names appeared on the statement, which was not only read aloud but was distributed to those present, remained throughout the somewhat lengthy session.[5] Five of the six appellants answered questions or volunteered statements. The husband of the sixth appellant, who did not speak, participated.

Throughout the session, the word "we" was frequently used, and we discern no direct disclaimer of responsibility for the particular action at the Indianapolis Selective Service board offices. Thus, the following pronouncements are noted:

"We are perfectly prepared to pay, or to serve our time in jail, because we expect that, that is what will happen to us. . . . "[I]t's not a matter of guilty or innocence, it's a matter of . . . responsibility. We claim that we are responsible for our actions. . . . We hope that by our action and our willingness to go to jail other people will see that this is the kind of commitment to the movement. . . . [W]e destroyed paper and paperwork . . . property that has no right to exist . . . and taking that property . . . destroying that property, that paperwork, you know, is not violent at all. . . . [T]o talk about why we have done

[5] The statement also contained a reference to "some of us" entering the computation research center of Dow Chemical Company in Michigan and destroying magnetic tapes and processing cards there. The Michigan portion was excised when evidence was submitted to the jury regarding the conference and the statement.

what must seem to many many people an extreme action. . . . [O]urs is thought of as a vanguard action. . . . We are the Beaver 55. . . . [Draft status] was in no way a part of my consideration . . . was not a factor in making the decision. . . . Well, these eight people came together and they felt that we should take this type of action and we did. . . . There have been a number of other actions in other cities where other people have come together and taken similar actions. . . . Everybody's bank account has been dwindled rapidly as the result of having to be on the road and being involved in this sort of thing. . . . [Y]ou are asking why we revealed our identities. . . . [I]n reference to his question about how we only have eight, it's because we have known each other and we have been a community for a long time. . . . [I]nvolvement by American people who are concerned has to go farther than marching. . . . [W]e have found that definitely more extreme measures are going to have to be taken and that is why we have taken this action. . . . The draft files that were destroyed in Indianapolis, no person can be legally inducted from the metropolitan area of Indianapolis until all these files are restored in their exact order, which is going to take them a long, long time; especially because some of these files are missing and I think that speaks, that also, not only to the fact that we can be effective through this kind of disruption . . . ."

The above statements were interspersed in a context of condemnation of the federal government, particularly as it was manifested in the Selective Service System and because of its involvement in the Vietnam war. The question before the trial jury, however, was not whether the motivation of the eight was sincere, nor indeed whether their condemnations might or might not have been justified. The jury was to determine whether the defendants were guilty or innocent of the crimes charged in the indictment. While the words spoken at the press conference were not entirely free of elements of tergiversation, the utterances in the joint context were susceptible of conveying a clear message that there was participation by all eight in the planning of the destructive action, and

its actual accomplishment, as principals or aiders and abettors.

In addition, other evidence introduced as to individual defendants justifies our holding, which is that we cannot say that the jury's verdict was not supported by sufficient evidence of guilt.[6] We turn then to whether there may have been other reasons for reversing the judgments of conviction. The claimed willingness to endure incarceration for their cause having now apparently flagged, we are presented with several claims of error.

II

However, before considering the contentions advanced by the appellants, it is necessary that we, on our own motion, determine whether reversal is required by the decision of this court in *United States* v. *Baranski*, 484 F.2d 556 (7th Cir. 1973). In that case, argued and decided subsequent to oral argument in the present case, we reversed the convictions of defendants who had gone to an Illinois draft board during office hours and had opened drawers and filing cabinets, pulled some records and poured animal blood over them. The basis of the reversal was the unconstitutionality of the portion of 50 U.S.C. App. §462(a) that the defendants here are charged with violating substantively in Count IV and with conspiring, *inter alia*, to violate in Count I.

This prima facie similarity is sufficient to call for a more detailed analysis of *Baranski* to determine the extent to which it is controlling in the present appeal, at least insofar as Counts I and IV are concerned.

In *Baranski*, as in the present case, the defendants were indicted in four counts, one conspiracy count and three substantive counts, involving the same three sections of the statute as here. While there may have been evidence that the defendants in *Baranski* committed acts violative of the three statutory sections charged substantively—the Government argued strenuously that there was no ques-

[6] The district court in its thorough and searching instructions charged the jury as to various aspects of "admissions" attributable to the party making them, including, "A person accused of a crime cannot be convicted upon trial upon a voluntary or involuntary admission. A voluntary admission must be corroborated by other credible evidence."

tion of it—the jury acquitted them on all three of these counts, and the posture of the case in this court, therefore, was in effect that acts violative of the three sections of the statutes charged substantively had not been sufficiently proven. The *Baranski* jury did convict the defendants of conspiring to violate the three statutory sections which they were found not to have violated in fact.

It, of course, is recognized that the crime of conspiracy is concerned with an agreement to violate the law and does not require accomplishment of the violation agreed upon in order for a defendant to be found guilty. It is clear in *Baranski* that the events in the draft board did not happen spontaneously but by agreement among the defendants. The planning was specific, including an advance call to a member of the news media who accompanied the defendants to the board office. The question then remained just what did the *Baranski* defendants agree to do if they did not agree to hinder and interfere with the administration of the Military Selective Service Act by force and violence (50 U.S.C. App. §462(a)), nor agree to commit willful damage to property of the United States (18 U.S.C. §1361), nor agree to remove, mutilate, and destroy records of the United States (18 U.S.C. §2071). The record in *Baranski* provided no basis for our concluding that the defendants had not accomplished at least one object of their conspiracy agreement.

The substantive §462(a) indictment count before the *Baranski* jury charged hindrance and interference "by force, violence *and* otherwise." The conspiracy count merely charged that one of the statutes the defendants had conspired to violate was §462(a). The statute does not use the word "and" but is phrased "by force or violence or otherwise." We were thus compelled to reach the conclusion in *Baranski* that the jury may have based, and probably did base in view of their verdicts of not guilty on the substantive counts, their guilty verdict on "otherwise" conduct, a term sufficiently broad to sweep within its ambit protected First Amendment communication. This interpretation was fortified by the prosecutor's argument to the jury that force and violence were not required for conviction.

We do not have this problem in the present case. The jury found, and its finding was supported by ample evi-

dence, that the defendants were guilty of substantive violations of 18 U.S.C. §2071 (mutilation, etc., of records and books filed and deposited in a public office of the United States).[7] With the specific substantive violations found to have existed, that these did not just occur but came about through advance agreement, *i.e.*, a conspiracy, is obvious.

We therefore find applicable here, as we could not in *Baranski*, the principle enunciated in *United States* v. *Tanner*, 471 F.2d 128, 139-40 (7th Cir. 1972), *cert. denied*, 409 U.S. 949, *i.e.*, that convictions on a conspiracy count are not affected "so long as any one of the objects of the conspiracy is unchallenged." In *Baranski*, the defendants could not challenge the fact that they were guilty of conduct which hindered and interfered "otherwise" than by force and violence. We therefore hold that *Baranski* does not require a reversal of the conspiracy count in the present case.

While beyond any argument in the present case there was substantial evidence of hindrance and interference by force and violence to support a jury conviction under the substantive count based on §462(a), our *Baranski* problem on Count IV is not the same as that which relates to the conspiracy count. Here, as in *Baranski*, the substantive crime is charged as having been accomplished "by force *and* otherwise." It is clear that while the defendants in the present case were committing destructive acts clearly violative of the force and violence portion of §462(a) they were also engaged in an attempt to communicate to the public their opinions on the wrongness of certain governmental activities.

We find guidelines for the disposition of the present issue in *Street* v. *New York*, 394 U.S. 576 (1969). In that case, involving the burning of an American flag, the Court, speaking through Mr. Justice Harlan, stated,

[7] As previously noted, the jury in the present case also found the defendants guilty of substantive violations of 18 U.S.C. §1361 (depredations against property of the United States). This conviction does not enter into our consideration of the issue before us inasmuch as the district court excised that particular statute as an object of the conspiracy from the indictment. While the inclusion of §1361 would have strengthened the parallelism and emphasized the differences between the present case and *Baranski*, the exclusion does not weaken the significance of the differences that do exist.

"Moreover, even assuming that the record precludes the inference that appellant's conviction might have been based *solely* on his words, we are still bound to reverse if the conviction could have been based upon *both* his words and his act." *Id.* at 587. (Emphasis in the original.) Here, we cannot say that on the particular substantive count the jury may not have convicted on the combination of words and acts. We are not at liberty as we are in the case of the conspiracy count to disregard a particular object of the conspiracy where there is an amplitude of proof of agreement on other viable and constitutionally permissible objects. We therefore reverse the conviction on Count IV.

III.

Turning to the contentions advanced by the defendants, we first address ourselves to the argument that their convictions on the conspiracy count should be overturned because of a variance from the indictment by the Government in its proof. Each of the seven overt acts alleged in support of the conspiracy count occurred, by the terms of the indictment, "[o]n or about October 31, 1969." The Government, nonetheless, and the trial judge as well, took the position at trial that the press conference of November 20th was arguably a continuation of the conspiracy made out in the indictment. Relying upon the co-conspirator exception to the hearsay rule, the district court accordingly refused to uphold the defendants in their objection to the general admission of inculpatory statements made by some of them individually on November 20th, and the court left it to the jury to decide whether the conspiracy charged was in effect on that date.

The true inquiry in cases like this is not merely whether the proof at trial wandered from the charges made in the indictment. To be error, the variance must, in addition, be such as to "affect the substantial rights" of the accused. *Berger* v. *United States*, 295 U.S. 78, 82 (1935). The cases have found this in situations where a defendant is surprised by the introduction of evidence at trial which is detrimental to his defense, or is left unprotected against a second prosecution for the same offense. *United States* v. *Cassell*, 452 F.2d 533, 536 (7th Cir. 1971).

The former circumstance is the one which defendants liken to their case; had they known, they assert, that the indictment encompassed a conspiracy continuing up to and beyond the day of the press conference, their mode of defense would have been "substantially different." We cannot agree, however, that any rights of the defendants were substantially affected. First, there can be little doubt that counsel for the defendants were aware, even before trial, that the Government had evidence of the press conference and would seek to introduce it at trial. If surprise arose, it was in connection with the legal theory upon which the Government sought to introduce the evidence, not with the fact of its attempted introduction. And the record is clear that defense counsel, upon being apprised of the continuing conspiracy view of the prosecution, was amply aware of its significance to the defense, for objection was timely made and overruled. Further, the fact that defendants were deprived, by the claimed obscurity of the indictment, of an opportunity to file a motion to quash the conspiracy count in part is not a fit basis upon which to find prejudice to them, for they exercised what was essentially the same option midway through trial when they objected to the introduction of evidence of the press conference. The trial judge overruled them because he thought that the scope of the conspiracy was an issue for the jury, not because defendants had earlier failed to file a motion to quash.

The defendants on appeal state that while they have no quarrel with the use by the prosecution at trial of press conference statements insofar as those statements were used in an attempt to prove that the defendants admitted having committed the acts of destruction of Government records on October 31-November 1, 1969, error existed in the jury's being permitted to consider the possibility of a continuing conspiracy. The argument here relies on recent First Amendment cases, such as *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969); defendants assert that in the press conference they were within the protection of the First Amendment, merely advocating action which did not present a clear and present danger.

While that which occurred at the November 20th press conference constituted words rather than action, constitutionally protected speech may nevertheless be an overt

act in a conspiracy charge. *United States ex rel. Epton* v. *Nenna*, 446 F.2d 363, 368 (2d Cir. 1971), *cert. denied*, 404 U.S. 948.

We conclude that the variance in proof from the indictment was at worst a harmless surprise to the defendants. Reversal will not stand on this ground.[8]

The defendants argue that even though the rules of conspiracy law allow conspirators to be found guilty on the basis of acts of their co-conspirators, analysis of the evidence as to the individual defendants is required. What the defendants seem to be seeking here is to have us weigh the evidence, particularly the alibi evidence. We do not deem this to be the function of the reviewing court once we have determined, as we have here, that there was not such an insufficiency of evidence as to require reversal.

The above contention of the defendants is based upon the premise that the district court in instructing on conspiracy utilized what is sometimes referred to as a *Pinkerton* instruction. The court also instructed according to the aiding and abetting statute, 18 U.S.C. §2.[9]

In *Pinkerton* v. *United States*, 328 U.S. 640 (1946), two brothers were convicted of conspiracy to evade taxes and of specific tax evasions. One of the brothers, Daniel, took an appeal to the Supreme Court, arguing that the other brother had committed the substantive offenses while he, Daniel, was in jail, and that the trial judge wrongly instructed the jury that it could convict him of the tax evasions of his brother if he were found to have conspired with his brother while in jail. The Supreme Court upheld the instruction, stating:

> "[W]hen the substantive offense is committed by one of the conspirators in furtherance of the unlaw-

[8] Even if the conspiracy were assumed *arguendo* to have been confined timewise to the date specified in the indictment, a strong case would be presented for a group confession under the circumstances of the joint press conference and its connotations of full ratification by all present of all that was said. In such case it would appear that the ratification would reach the agreement involved in the conspiracy as well as showing either direct participation or aiding and abetting in the substantive crimes. We do not, however, need to decide this issue.

[9] 18 U.S.C. §2(a):

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

> ful project . . . [t]he criminal intent to do the act is established by the formation of the conspiracy. Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise. The rule which holds responsible one who counsels, procures, or commands another to commit a crime is founded on the same principle. That principle is recognized in the law of conspiracy when the overt act of one partner in crime is attributable to all. An overt act is an essential ingredient of the crime of conspiracy . . . . If that can be supplied by the act of one conspirator, we fail to see why the same or other acts in furtherance of the conspiracy are likewise not attributable to the others for the purpose of holding them responsible for the substantive offense." 328 U.S. at 647.

The defendants do not challenge the *Pinkerton* holding as incorrect law nor do we consider it as not having continuing viability. Our question here, however, is initially as to the correctness of the premise that a *Pinkerton* instruction was given. The portion of the court's extensive and thorough instructions which the defendants apparently believe incorporated the *Pinkerton* holding was contained in the court's instruction No. 33:

> "You are not to consider what one person may have said or done in concluding whether or not another person was a member of the conspiracy partnership; his or her membership must be established by evidence as to his or her own conduct, what he or she said or did in becoming a member. But, if you find from the evidence beyond a reasonable doubt that the alleged conspiracy was formed and existed and that two (2) or more of the alleged conspirators were members thereof, then the alleged acts and omissions thereafter, if any, knowingly done, and the statements thereafter, knowingly made, if any, by any member of the alleged conspiracy, may be considered by you as evidence in the case as to any of the other members of the alleged conspiracy, even though such acts and omissions and statements may have occurred in the absence and without the knowledge

of such others, provided such acts or omissions and statements were knowingly done, omitted or made during the continuance of such conspiracy before its termination and in furtherance of one or more of the alleged objects or purposes of the alleged conspiracy. Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement made."

We find nothing more in this portion of the instruction than a statement of well-established law relating to the co-conspirator exception to the hearsay rule. See, *e.g.*, *McMahan* v. *United States*, 424 F.2d 1216, 1219 (7th Cir. 1970), *cert. denied*, 400 U.S. 826.

Even if this portion of the jury charge could be construed to present the phase of *Pinkerton* adverted to above, in the absence of a reversal of the conspiracy conviction we would find no reversible error in giving such an instruction.

Even if the conspiracy convictions were to be reversed, the particular instruction here given would be insufficient to taint the convictions based upon substantive Counts II and III. Instruction No. 33 pertains only to the conspiracy count, and we will not assume that the jury would have interpreted it otherwise.[10] While the particular instruction is long and complex, occupying some 12 pages of the transcript, we cannot give it any reasonable construction other than that it pertained solely to the ramifications of the conspiracy count and conspiracy law and was not applicable to the jury determination of the issues presented by the substantive counts. Further, the jurors did not have to carry the intricate legal message to their deliberation room in their memories as the court sent the instructions to the jury room. Finally, we note that elsewhere in the instructions the jury was admonished that "[a] voluntary admission or confession after the commission of a crime and in the case of the crime of conspiracy, after the termination or abandonment thereof,

[10] "Appellate courts should be slow to impute to juries a disregard of their duties . . . ." *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933).

constitutes evidence only against the person making it. It must not be considered as evidence against a co-defendant, and must be disregarded by the jury in determining the guilt or innocence of a co-defendant."

We have not concerned ourselves with defendant Mack's solo appearance on a radio talk show during which he responded to a question by stating, "One action I took was destroying draft files in Indianapolis." Testimony as to this was admitted as to Mack alone, and the other defendants were adequately protected by the admonitory instruction just quoted.

Defendant Williams contends that there was reversible error in the judge's reference to the source of the name "Beaver 55" as being a publication which Williams had worked on with his mother. Whether this was a proper inference from the evidence we need not determine. The statement was made out of the hearing of the jury and could not be the basis of a reversal.

Williams also urges reversal because of the exclusion of testimony by James Douglass, a visiting professor on Nonviolence at the University of Notre Dame. After the professor had testified as to his background, a hypothetical question was posed to him involving some of the facts brought out in evidence concerning the evening of October 31-November 1 and the November 20th press conference. At the conclusion of the statement of hypothetical facts, he was asked whether he had an opinion which "could explain their quote [at the press conference] 'claiming responsibility' under those circumstances." Objection was made to the question on the ground it did not include all of the facts that had been presented in evidence, that it invaded the province of the jury, and that some of the facts were not accurately stated. While not deciding that more than one of the grounds of objection may not have been well taken, we note that the trial court rested the sustaining of the objection on the basis that explaining what the defendants meant by "claiming responsibility" was not the subject for expert testimony. We agree. Further, any claim of reversible error is obviated here by the fact that there was no offer to prove what the

testimony would be"[11] and the fact that the witness was withdrawn with the observation that he might be recalled. He was not thereafter returned to the stand.

Williams also asserts in support of his own nonparticipation in the destruction occurring at the draft board offices certain alibi testimony and the claim that the statement passed out at the press conference which he attended only had his typed name at the end and no handwritten signature. However, two FBI agents testified that he had said he had signed the Beaver 55 statement. The argument appears to ignore the applicability of the aiding and abetting statute, and, in any event, a question of credibility was presented which was resolved against Williams.

Williams further contends that there was reversible error in the failure of the district court *sua sponte* to sever him from the trial. Factually, this claim appears to be based on the situation that Mack's confession was put into evidence, Mack did not take the stand, and all of the defendants were represented jointly by a team of three attorneys.[12]

The present claim of error is primarily predicated on *Bruton* v. *United States*, 391 U.S. 123 (1968), and *Schaffer* v. *United States*, 362 U.S. 511 (1960), as cited and quoted in *United States* v. *Gougis*, 374 F.2d 758 (7th Cir. 1967).

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[11] A statement was made during a side bar conference indicating a desire to present evidence as to the philosophy, purposes, and methods of a Christian non-violent movement. While such evidence might be explicative of the motivation of the defendants and even lend some apparent support to their position that what they were doing was for the good of humanity as they conceived it, the statement does not validate as admissible evidence an expert opinion as to what the defendants may have meant by "claiming responsibility." The issue at the trial was not defendants' motivation but whether they had violated certain statutes of the United States.

In *United States* v. *Eberhardt*, 417 F.2d 1009, 1012 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970), the defendants in a factually comparable case were permitted to present evidence that their actions were taken pursuant to a good faith belief in the immorality and illegality of the Vietnam war, but they were not allowed to present expert testimony as to the reasonableness of those beliefs.

[12] While the brief for Williams refers to the statements of several of the defendants, primary emphasis appears to be placed on Mack's confession, presumably referring to Mack's solo radio talk show appearance subsequent to the press conference during which he made a first-person confession. Evidence as to this confession was admitted as to Mack alone and the jury was properly instructed.

We do not find *Bruton* applicable. In that case, the Supreme Court concluded that cautionary instructions given by the trial court to the jury with respect to disregarding implicating statements of a co-defendant were ineffective and could not overcome the great risk that the defendant's case would be prejudiced because the jury would or could not follow the instructions. This issue was raised in *Howell* v. *United States*, 300 F. Supp. 1017 (N.D. Ill. 1969), and was thoroughly analyzed by Judge Marovitz, who, *inter alia*, pointed out that *Bruton* explicitly stated that no exception to the hearsay rule was involved in the case before the Court. In affirming the *Howell* conviction, this court expressly adopted Judge Marovitz's opinion and approved the reasons set forth in his opinion. *Howell* v. *United States*, 442 F.2d 265, 275 (7th Cir. 1971). In the present case, as we have already observed, the well-established exception to the hearsay rule applicable to a co-conspirator's statement is involved.

It is clear from *Schaffer-Gougis* that even though a defendant does not move for severance, which is the situation in the present case, the trial judge has a continuing duty to sever if prejudice appears during trial in a situation where proof of the conspiracy count has failed on a multi-count indictment. Here, the conspiracy count did not fail. It is settled that severance rests in the discretion of the trial judge, subject to correction only if there has been an abuse of discretion. *United States* v. *Echeles*, 352 F.2d 892 (7th Cir. 1965). The unsupported possibility that favorable testimony might be elicited from a separated co-defendant, who thereby could be used as a witness, does not make denial of a motion for severance erroneous. *United States* v. *Johnson*, 426 F.2d 1112, 1116 (7th Cir. 1970), *cert. denied*, 400 U.S. 842. No greater duty should be imposed in the absence of a motion. Williams, while claiming prejudice, provides little, if any, support for the claim. Under these circumstances we are not prepared to hold that there was an abuse of discretion in not severing Williams. *United States* v. *Kahn*, 381 F.2d 824 (7th Cir. 1967), *cert. denied*, 389 U.S. 1015.

While the defendant Mack adopted by reference all of the issues raised in behalf of his co-defendants, his brief

in this court was devoted solely to a Sixth Amendment claim of deprivation of effective assistance of counsel. From the record it appears that all defendants, including Mack, retained two Indianapolis attorneys to represent them. During the pretrial period various motions were filed by the attorneys on behalf of Mack individually, particularly with regard to the amount of his bond and his desire to travel outside the jurisdiction. On the first morning of trial, the judge observed that a Chicago attorney, Julius Sherwin, had entered an appearance for all of the parties except Mack. The attorney stated he now proposed to appear for Mack also. The trial judge called Mack to the podium and interrogated him as to his wishes that this attorney also represent him, whether he was asking for a continuance, whether he had conferred with the attorney, whether there had been sufficient consultation time, and whether he was ready for trial. Mack responded in the affirmative. Thereafter, during the course of the trial, Sherwin made a not inconsiderable effort to keep out of evidence highly incriminating materials seized at Mack's apartment, a matter as to which only Mack had standing.

While it is no doubt true that prejudice to a defendant from the failure to have effective assistance of counsel results whether counsel is court-appointed or selected by the accused, unless there are facts constituting a waiver, *Craig* v. *United States*, 217 F.2d 355, 359 (6th Cir. 1954), we need not make any inquiry as to whether there was any waiver resulting from the manner of retention of counsel or from the failure to raise this question in the trial court. We here find no demonstrable prejudice.

Per se violation of the Sixth Amendment does not result from joint representation of co-defendants. *United States* v. *Williams*, 429 F.2d 158, 160 (8th Cir. 1970), *cert. denied*, 400 U.S. 947. The claimed prejudice was directed at remarks made by Sherwin, who apparently acted as chief trial counsel, although the Indianapolis attorneys also participated in the trial throughout its duration. It has not been demonstrated that any of the remarks were made in the presence of the jury; they occurred during colloquies between Sherwin and the judge. Our examination reflects that some of the remarks did partake of candor, but honesty and forthright recogni-

tion of clearly established facts may well as a matter of trial strategy provide a better defense than a dissimulative distortion of that which is patent and virtually beyond argument.

There can be no argument that the clearest case of guilt established by the evidence was that against Mack. As this court said in a comparable case, *United States* v. *Gallagher*, 437 F.2d 1191, 1194 (7th Cir. 1971), *cert. denied*, 402 U.S. 1009, "The mere fact that the evidence against appellant's co-defendant . . . is stronger than that against the appellant does not indicate, much less demonstrate, the existence of a conflict of interest between the defendants." In that case, as in the present case, the particular appellant was apparently the dominant member of the conspiracy and played a more prominent role in carrying out the illegal activities involved. This court held that because a difference in the weight of the evidence against co-defendants may cause counsel to speculate as to the trial strategy he should employ does not itself serve to establish that counsel is unable effectively to represent both defendants.

Under the tests laid down in *United States* v. *Stevens*, 461 F.2d 317, 319 (7th Cir. 1972), *cert. denied*, 409 U.S. 948, we decline to engage in a process of critiquing as to matters of trial conduct and tactics adopted pursuant to defense counsel's professional opinion on the merits of the case. We find no travesty of justice here. If, as Mack seems to contend now, the attorney was throwing him to the wolves in favor of his other clients, it is not without significance on the lack of prejudicial effect that all of the other defendants also were found guilty.

We have considered and find without merit other contentions raised by the appellants, which contentions for the most part are variational arguments of those which we have resolved hereinbefore. While perhaps the cessation of the war effort in Vietnam has brought that conflict and its divisiveness into a more objective focus, we still find appropriate to our present consideration and adopt the language with which Judge Sobeloff dealt with the underlying moral and philosophical problems of cases such as the present one in *United States* v. *Moylan*, 417 F.2d 1002, part III, at 1007-09 (4th Cir. 1969),

cert. denied, 397 U.S. 910 (1970). We agree that "the exercise of moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law." *Id.* at 1008.

Accordingly, the judgment of conviction on Count IV is reversed and the judgments of conviction on Counts I, II, and III are affirmed.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

July 10, 1974

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. JOHN S. HASTINGS, Senior Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. JOHN MICHAEL DONNER, JANE ANNE KENNEDY, CONNIE GRUBBS McNAMARA, ROBERT MARTIN McNAMARA, PAUL JOSEPH MACK, THOMAS RHOLAND TROST, and JAMES DAVID WILLIAMS, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 18812	No. IP 70-CR-2
	Cale J. Holder, Judge

On consideration of the petitions of defendants-appellants, John Michael Donner, Jane Anne Kennedy, Connie Grubbs McNamara, Robert Martin McNamara, Paul Joseph Mack, Thomas Rholand Trost, and James David Williams, for a rehearing by the court en banc in the above entitled appeal, and no member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an en banc rehearing, and the panel having voted to deny a rehearing,

IT IS ORDERED that the petition of the defendants-appellants for a rehearing en banc in the above entitled appeal be, and the same is hereby denied.

APPENDIX B

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 18, United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, of any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 1361

Whoever willfully injures or commits any depredation against any property of the United States, or of any department or agency thereof or any property which has been or is being manufactured or constructed for the United States, or any department or agency thereof, shall be punished as follows:

If the damage to such property exceeds the sum of $100, by a fine of not more than $10,000 or im-

prisonment for not more than ten years, or both; if the damage to such property does not exceed the sum of $100, by a fine of not more than $1,000 or by imprisonment for not more than one year, or both.

Title 18, United States Code, Section 2071(a)

Whoever willfully and unlawfully conceals, removes, mutilates, obliterates, or destroys or attempts to do so, or, with intent to do so takes and carries away any record, proceeding, map, book, paper, document, or other thing, filed or deposited with any clerk or officer of any court of the United States, or in any public office, or with any judicial or public officer of the United States, shall be fined not more than $2,000 or imprisoned not more than three years, or both.

Title 50, Appendix United States Code, Section 462(a)

[A]ny person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

APPENDIX C

EXCERPTS FROM THE TRIAL TRANSCRIPT

1 Argument on the admissibility of the November 20, 1970 press conference (Tr. 513-517)

Mr. Sherwin: You will, of course, give the jury instructions as to how to assess the acts and declarations of the co-conspirators, and that everyone who is established as part of the conspiracy is as guilty as the others, everyone who entered the conspiracy and participated; but after the termination of the conspiracy just as Your Honor stated, it doesn't bind anyone except the person making it.

The Court: That brings up a fine legal question right now, that we may toss around a bit. * * * In view of this statement here, leading off there, was the conspiracy ended that day, or was it still in progress?

Mr. Sherwin: I would respectfully submit that the one conspiracy charged, Your Honor, is kind of—you have already so ruled that there was only one conspiracy stated in this Indictment, and I—

The Court: I know. You expound on it: Was the draft board conspiracy, the acts, the conspiracy terminated, the offense if any committed?

Mr. Sherwin: Now at least the object—

The Court: Going by the statement here, right here on this day, calling a public meeting and communicating to the world, "This is what we did, and our objective is this and this, and that's what got you here today, and to advertise that everybody else is wrong and we are right."

Mr. Sherwin: No, they are accepting the responsibility for that, which the Court has already indicated—

The Court: Don't you think that propaganda was a part of the purpose of this conspiracy? Couldn't that be—

Mr. Sherwin: No, they don't charge that. But I think they wanted to educate the American public—

The Court: A part of the conspiracy? The purpose for undertaking the conspiracy?

Mr. Sherwin: No—

The Court: Part of the purpose of the objectives is to advertise, in order to gain followers in other communities?

* * *

[W]hen did the conspiracy end, now? We understand that, absent evidence, when a person—when the conspirators are discovered by the law it's presumed to end at that time, or when one of them is arrested or indicted; but where there is evidence that they defied the law, the conspirators, and they then intend the conspiracy to go on, still going to run amok, do this, do that—if there is evidence to that effect, it's continuing even beyond what the presumption is, that it's ended—

Mr. Sherwin: I respectfully indicate to you that this conspiracy charged in the Indictment as the conspiracy which they entered was terminated. Now they are trying to tell the public what the salutary effect of their conduct is, and to "gain converts", as Your Honor put it, to the proposition that we don't belong in Viet Nam, we shouldn't be paying high taxes, that we shouldn't be taking * * * lives, losing forty six thousand and maiming a hundred thousand, and doing all of the things that go on, and policing the whole world when we can't take care of things right here in Indianapolis.

It is called to my attention that some of them said that "We didn't engage in conspiracy, but we accept the re*sponsibility for the acts of others.*"

The Court: What was meant by this on page 4: "To our families and friends we say: Understand us and join us"? That sounds like it is going on into the future. • • • It seems to be propaganda. The next paragraph says: "These actions must continue". • • • Sooner or later this question may come up; and it usually does in a conspiracy case.

2 Argument on motion for judgment of acquittal (Tr. 736-42)

The Court: What was the object of this conspiracy charged in Count I, in your opinion? • • •

Mr. Sherwin: It was to commit the depredations, the entering, and the desecration, the vandalism—whatever was the terminology—at one specific place: the Selective Service Office at 222—Indianapolis, whatever the address was, the Wulsin Building, period; nothing more.

The Court: That is what I thought you would say. Now will you turn to the Indictment, Count I? And you are mistaken.

• • •

My point to you is that in that first rhetorical paragraph there is a charge of an object of the conspiracy on the part of the defendants and "divers persons whose names are unknown to the Grand Jury", "to violate Title 50 Appendix U.S.C. Section 462(a) by wilfully hindering and interfering with the administration of the Military Selective Service Act of 1967, in violation of Title 18 U.S.C. Section 371." It was not limited to 222 East Ohio Street; it meant the whole panorama, from coast to coast.

Now look at 2, and it emphasizes there, rhetorical paragraph 2 of Count I: "It was a part of said conspiracy"—*referring to 222 East Ohio Street.*

Mr. Sherwin: Agreed.

The Court: Just a part, you see?

• • • Now is it in the continuing conspiracy for a person to get on TV shows and to have interviews in front of the public, and use the establishment's press and radio and television at Christamore House? And would that be furthering the object of the conspiracy, here, of wilfully hindering and interfering with the administration of the Military Selective Service Act?

Mr. Sherwin: Patently and pointedly no, for this reason: It's an exercise of right accorded to every American citizen under the First Amendment, that if free speech happens to lead to dissent, it can't be construed as a conspiracy to interfere with any operation of the Government.

The Court: Well now, there you are on the stump again.

Mr. Sherwin: No, no. No, no, no.

The Court: Let me pick out one statement. Let me pick out one statement in that Christamore House press conference. Can you think of one statement that was used in there that went beyond free speech?

• • • Was there any invitation by anyone in there, for other people to join the movement to wreck a draft board?

Mr. Sherwin: If that was stated—

The Court: Was it?

Mr. Sherwin: I assume it was stated, but the only man who would have said it was Paul Mack, in the presence of the others; and their mere presence can't be construed to be a tacit concurrence.

So now you have got Paul Mack inviting someone to join the conspiracy, which they haven't proven.

The Court: Well, I haven't laid it on the planning board, but it is obvious to me that this rhetorical paragraph 1 of Count 1 states a broader conspiracy charge than you think.

• • •

The Court [addressing the U. S. Attorney]: Your response, now, to the motion? And you might address yourself to the observation of the Court, here, about the breadth of your conspiracy charge, gentlemen, that I have posed to Mr. Sherwin.

Mr. Miller: Your Honor, with respect to Count I: As the Court noted, the last portion of the conspiracy in paragraph 1 accuses the defendants of wilfully interfering and hindering the administration of the Military Selective Service Act of 1967. As part of the statement of all of the defendants at the Christamore House, in describing the destruction of the records, the statement concluded: "These actions must continue. The spirit of the people will not be overcome." They also said: "To the movement we say: We have found an alternative to violence and passive demonstrations which responds to the urgency of the situation in America." And a reading of their entire press conference indicates that that alternative is the destruction of property similar to draft boards. • • • Consequently on this particular type of a motion there is some evidence—we think overwhelming—but at least there is some evidence with respect to the fact that this is a continuing, and invited-continuing conspiracy by the defendants.

3 The Government's closing arguments

On or about October 31, 1969, in this District, the Southern District of Indiana, it is the Government's contention that as a part of a conspiracy to destroy the public records in our Selective Service Office here in Indianapolis, and as a continuing conspiracy to hinder and interfere with the Selective Service Act, that these defendants did break into the offices of the Selective Service, destroyed and mutilated the property found therein, and for some time and period afterwards did continue this conspiracy to interfere with the laws of the United States. (Tr. 1241-42)

Ladies and gentlemen of the jury, I have read the [Nov. 20 press conference] statement in its entirety. It was not necessary that I read it in its entirety; I could have selected the things out of it that I thought were favorable to the Government's case and omitted the things that were—perhaps could have been said to be favorable to the defendants. We have no desire at all to suppress anything these defendants stated at the news conference.

Here is their statement: "Understand us; join us."

They told us on November 1st they were going to reveal themselves, and here they are, and they are still at it, ladies and gentlemen of the jury.

Now they say to the corporations—whether big corporations or small they don't say, but corporations—"Stop polluting, stop exploiting the poor here and abroad."

"Understand us and join us." "These actions must continue." (Tr. 1256-57)

Let's get back to the Christamore House and the press conference. I want to read through this press conference rather carefully. In no circumstances do I wish to misrepresent anything that the defendants stated at that

press conference. In case it is represented that this was just a press conference dealing with philosophy, and no one really was admitting anything, in several instances the other defendants admitted that this was their statement. I don't think there is any question at all that they were making a joint statement that day.

Miss Kennedy—she is answering a question, and she says, "Each of"—she says, "I am sure that there are." Someone asked her, "Is there any way to do things about the things that are wrong in society, other than destroying them?" And Miss Kennedy said, "I am sure there are, I am sure there are, ours is thought of as a vanguard action. But I see it as a way to mobilize a community, a series of communities, each of whom may do a difficult thing but all must come to their responsible humanhood relative to the evils that we have talked about in our statement. Yeah, we have the opportunity to say, Brothers and Sisters what are you doing about it?"

We talked about in our statement—similarly, Miss Mulert—• • • Jo Ann Mulert; she is asked with respect "Did any of the group participate in the Moratorium?"

"Uh, members of our group, all of us were in Washington over the week-end of the Moratorium, mostly I would say, especially speaking for me at the time only for the press conference, we have, I feel we have some differences with the Moratorium people, I feel that as stated in our statement that we have found an alternative to violence and passive demonstrations. I believe the Moratorium to be a passive demonstration, I believe involvement by American people who are concerned has to go farther than marching."

Paul Mack says—this is in case you may feel in any way confused when the defendants talk about an alternative to violence, they are not talking about an alternative

to destruction of property—Paul Mack says: "Yes, that's in reference to an earlier question about aren't there other ways to change a situation besides destroying property. I feel we have found out that the type of demonstrations that we have had in the past, petitioning, working for peace candidates, which I was very much involved in, all of these have failed and we have found that definitely more extreme measures are going to have to be taken and that is why we have taken this action."

They are still talking about things that are going to be done later, gentlemen. We heard in the statement of the defendants to Mr. Nixon "and to the corporation executives we say: Beware, your brutality has been recognized and we won't be stopped. Stop producing weapons. Stop polluting, stop exploiting the poor here and abroad." (Tr. 1260-62)

What business do these people up in Chicago have down here? Just because Paul Mack wants his draft papers torn up; just because Paul Mack gets in front of a television camera, they have no business down here. They don't have an original idea among them. There have been Draft Board papers torn up in other cities. They haven't even got the sincerity of an original idea. They have no business here; they have no business saying, "Come on, join us, let's take out after corporate executives"—they don't say big corporations or little ones. Who is to decide what corporations are polluting, who is to stop exploiting the poor. Who makes these decisions? Mike Donner? Someone who doesn't know what Communism is? A marriage expert, like Marty McNamara? Who is to decide what corporations? Who decides what property should be exempt, and what is destroyed? (Tr. 1269-70)

This case is about a group of fuzzy-thinking individuals who wanted to destroy other people's property, who apparently don't have an original idea among them, and if they have an idea, they can't communicate it so nobody even knows they are around—non-entities. They must destroy, an act which more resembles the acts of a nine-to-thirteen year old than an adult. The only way they can get on television with their sale and fuzzy ideas, only way they can get anybody to listen to them is to destroy something. That's what the case is about. That's why the defendants are guilty of conspiracy, of planning this. They are guilty of that conspiracy to destroy those records over there, and they were very anxious to continue and all they need is a little encouragement from someone: You go ahead and keep on destroying. (Tr. 1272)

I might add also: Mr. Barnhart is asking the jury to acquit the defendants because of this protest, this idea that they had, they have claimed responsibility, but didn't actually commit the act of breaking into the Selective Service Office. If you find them not guilty on that basis, then you are joining the conspiracy; he is asking you to join the conspiracy of the Beaver 55. (Tr. 1346-47)

Jane Kennedy said she was the vanguard of the movement; that's in the press conference. You can say "vanguard" in another way: She could have said "We are the shock troops of the movement; come and join with us; we are going to go out and do more damage to draft boards; this is just the first one."

In that connection, the Court is going to instruct you about a continuing conspiracy. If there was one, it will be up to you to determine that. By their own admissions this conspiracy was in effect on May—or November 20, 1969: They want to continue with the movement; they

have found an alternative to violence—whatever that means, because when you go in and destroy property, I think that is pretty violent, doing violence to property. (Tr. 1363)

4 Jury Instructions

Instruction No. 21 (Tr. 1144-45)

Each of the eight (8) defendants are not on trial for any act or conduct not alleged in the four (4) counts of the Indictment.

You are here to determine the guilt or innocence of each of the eight (8) defendants from the evidence before you and under the law as the Court gives it to you in these instructions. You are not called upon to return a verdict as to the guilt or innocence of any other person or persons. So if the evidence convinces you beyond a reasonable doubt of the guilt of any of the accused defendants, you should so find even though you may believe one or more other persons are also guilty. If any reasonable doubt remains in your minds after impartial consideration of all the evidence, you should acquit the accused.

I have told you that separate crimes or offenses are charged in each of the counts of the Indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find all or some of the accused defendants guilty or not guilty or one of the offenses charged should not control your verdict with respect to any other offense charged.

It is your duty to give separate, personal consideration to the case of each individual defendant. When you do so, you should analyze what the evidence shows with respect to the individual, leaving out of consideration entirely any evidence admitted solely against some other defendant or defendants and of statements and conduct

other defendants. Each defendant is entitled to have his case determined from his own conduct and statements, except as I have instructed you in these instructions with respect to the overt acts of conspirators, and the other evidence in the case which may be applicable to him, otherwise that evidence or statements and conduct of other defendants or other unknown alleged members of the conspiracy concerning themselves and such defendant are not admissible against the non-uttering defendant.

Under these instructions, depending upon the evidence and the law, you may find one or more of all of the defendants guilty or not guilty as charged. And at any time during your deliberations you may return into Court your verdict of guilty or not guilty with respect to any defendant as to whom you have unanimously agreed, or you may await until you have determined your verdict as to all of the defendants.

Instruction No. 28 (Tr. 1159-60)

Evidence that an accused was elsewhere at a particular time than as claimed by the United States of America is commonly known to the law as an "alibi".

The offering of evidence of an alibi by a defendant does not shift the burden of proof from the United States of America to such defendant but it must maintain its burden of proof, all as explained in these instructions. The accused is not required to prove an alibi beyond a reasonable doubt, or even by a preponderance of the evidence. The alibi is sufficient if the evidence thereof raises a reasonable doubt as to any essential element and fact required to be proved by the Government. It should be obvious to you as to the theory of the law pertaining to the defense of an alibi. By this theory, where one is accused of a criminal offense which asserts as an essen-

tial element and fact that he was at a certain place at a certain time and there is evidence that he was at another place at such time that creates in the jury's mind a reasonable doubt that he was at the place charged at the time charged, then there can be no conviction.

It is for you to determine from all of the applicable evidence as explained in these instructions as to when the alleged conspiracy was formed and determine whether or not such defendant was a member thereof. If you find that a defendant was not actually present at the scene of the alleged crimes, I call your attention to the allegations of the Indictment's charge or [sic] conspiracy and all of these instructions including the aider and abettor instruction number 34 and determine whether or not such defendant's presence at such scene was essential.

Instruction No. 33 (Tr. 1181-1193)

Stripped of the alleged facts of count one (1) of the Indictment, the essential elements of the criminal conspiracy charged in such count are as follows:

1. That the alleged specific conspiracy was formed and existing at or about the time alleged;

2. That two or more or all of the defendants and/or the alleged unknown persons knowingly and wilfully became a member of the conspiracy;

3. That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in count one (1) of the Indictment; and

4. That such overt act was committed in furtherance of one or more of the objects of the conspiracy as charged.

"Conspiracy," as charged in count one (1) of the Indictment means, that on or about October 31, 1969, the de-

fendants and divers other unknown persons allegedly agreed to combine by concerted action to accomplish one or more unlawful purposes or objects. Such an alleged conspiracy is a form of partnership in which each conspirator found by you beyond a reasonable doubt to be a member of the conspiracy after the conspiracy and before termination becomes the agent of every other member of the conspiracy found by you beyond a reasonable doubt to be a member. There must be two (2) or more conspirators who so qualify together with other essentials as defined in this instruction before there can be a conspiracy. The gist of the conspiracy offense is an agreement devising ways, means and methods and in such manner to violate or disregard Title 18 U.S.C. Section 2071 and Title 50 Appendix U.S.C. Section 462(a) quoted law in instruction number 31.

The mere similarity of conduct among the various defendants and the alleged unknown persons and the fact they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy but it is a fact, if proven beyond a reasonable doubt, which may be taken into consideration by you with all the other evidence in determining whether or not there was a combination or conspiracy and whether or not such defendant or defendants and the alleged unknown persons were members of such conspiracy, if any.

The quoted conspiracy statute says that the conspiracy may be formed in any manner, therefore, it is not necessary that the United States of America establish that two (2) or more, or all of the defendants and/or unknown persons met together at a specific time and place and entered into an explicit, express or formal written or oral

contract or agreement between themselves as to what their unlawful object or purpose was to be, or the details, or plans or means by which the alleged unlawful purpose would be carried into effect and carried out. Concerning the formation of the alleged conspiracy, the United States of America must prove by the evidence to your satisfaction, beyond a reasonable doubt, that two (2) or more, or all of the defendants and/or unknown persons in any manner or by any means tacitly, that is impliedly, or expressly came to a mutual express or implied understanding as to the alleged ways, means and methods with a common design or purpose to accomplish one or more of the alleged unlawful objects and that the alleged conspiracy, or agreement, was formed in, or that any one of the alleged overt acts in furtherance thereof, if any, took place in Marion County, Indiana.

In considering whether or not a particular defendant and any unknown person was a member of the specific conspiracy charged, you must do so without regard to and independently of the statements and declarations of others, that is, you must determine the membership of a particular defendant from the evidence, if any, concerning his own actions, his own conduct, his own declarations, or his own statements, and his own connection with the action and conduct of others.

A defendant and any alleged unknown person may become a member of the alleged conspiracy without full knowledge of all of the details of the alleged conspiracy providing you find from the evidence beyond a reasonable doubt that such defendant or any alleged unknown person agreed as set forth in these instructions with one or more of the other defendants or any alleged unknown person to all of the ways, means or methods in the manner alleged in the Indictment to be used to accomplish the

alleged unlawful objects or purposes. On the other hand, any defendant or any alleged unknown person who had no knowledge of the alleged conspiracy, but innocently, unintentionally and unwilfully happens to act in a way which furthers an object or purpose of the alleged conspiracy, does not thereby become a co-conspirator.

Before you can find any of the defendants or any alleged unknown person were members of a conspiracy, the United States of America must prove to you by the evidence beyond a reasonable doubt that the conspiracy was formed, and that such defendant or defendants or any alleged unknown person knowingly and wilfully participated in the plan unlawfully with a specific intent to advance or further one or more of the alleged unlawful objects or purposes. So if you find from the evidence beyond a reasonable doubt that any two (2) or more or all of the defendants and/or unknown persons with an understanding of the alleged unlawful character of the plan, intentionally encourages, advises or assists, for the purpose of furthering the undertaking or scheme, such alleged party thereby becomes a knowing and wilful participant; if you do not so find, then such party is not a conspirator.

It is not necessary that all of the members of a conspiracy enter into the agreement at one time. If you find from the evidence beyond a reasonable doubt that two (2) or more of the alleged conspirators did originate the conspiracy as alleged in count one (1) of the Indictment and that one or more of the other alleged conspirators were not members thereof at the inception of the alleged conspiracy, then I instruct you that such non-members may become members during the continuing existence of the conspiracy, that is, before the termination of the alleged continuing conspiracy by such person or persons know-

ingly and wilfully joining the alleged existing conspiracy. I further instruct you that a person, if any, who knowingly and wilfully joins the alleged existing conspiracy before its termination is as guilty as if he had been one of the instigators or originators thereof.

You are not to consider what one person may have said or done in concluding whether or not another person was a member of the conspiracy partnership; his or her membership must be established by evidence as to his or her own conduct, what he or she said or did in becoming a member. But, if you find from the evidence beyond a reasonable doubt that the alleged conspiracy was formed and existed and that two (2) or more of the alleged conspirators were members thereof, then the alleged acts and omissions thereafter, if any, knowingly done, and the statements thereafter, knowingly made, if any, by any member of the alleged conspiracy, may be considered by you as evidence in the case as to any of the other members of the alleged conspiracy, even though such acts and omissions and statements may have occurred in the absence and without the knowledge of such others, provided such acts or omissions and statements were knowingly done, omitted or made during the continuance of such conspiracy before its termination and in furtherance of one or more of the alleged objects or purposes of the alleged conspiracy. Otherwise, any admission or incriminatory statement made outside of Court by one person may not be considered as evidence against any person who was not present and heard the statement made.

If you find from the evidence beyond a reasonable doubt that there was a complete conspiracy as charged in count one (1) of the Indictment and you further find that such conspiracy was intended for only one (1) alleged action against one (1) Selective Service Headquarters on or

about October 31, 1969, and/or that the conspiracy, if any, was abandoned voluntarily by the parties or involuntarily by action of the United States of America or other police action, then I instruct you that such alleged conspiracy was terminated on or about October 31, 1969, or on the date of abandonment. If you further find that the conspirators extended the conspiracy for related purposes, then it is for you to determine when it terminated.

If you find from the evidence beyond a reasonable doubt that an alleged member of the conspiracy before it was terminated voluntarily left and terminated his or her connection with the alleged conspiracy and thereafter did not wilfully and knowingly participate in such alleged conspiracy, then I instruct you, that such a resigned conspirator is not chargeable with the acts, omissions, and statements of any of the remaining conspirators that occurred after his resignation. However, if prior to his resignation the conspiracy was complete, he cannot escape responsibility thereof by resignation. The theory of count one (1) of the Indictment is that the conspiracy offense was complete upon the date of the commission of any one of the alleged overt acts but that the conspiracy continued thereafter until terminated.

Count one (1) of the Indictment charges seven (7) separate overt acts in furtherance of, in the execution of, and for the purpose of carrying into effect one or more of the objects, designs, and purposes of the alleged conspiracy. It is not required that the United States of America prove each and every one of the alleged overt acts, it is sufficient that the Government prove beyond a reasonable doubt any one of the alleged overt acts in furtherance of one or more of the alleged unlawful purposes and objects as alleged in count one (1) of the Indictment. In this connection, I instruct you, that the al-

leged overt acts in count one (1) of the Indictment need not be an unlawul act in and of itself, but it is necessary that such overt act be performed in furtherance of one or more of the alleged unlawful purposes of the alleged conspiracy.

The overt act need not be criminal in nature, if considered separately and apart from the conspiracy. For example, an overt act of a conspiracy may be the act of or the failure of a conspirator to walk across the street, providing that such act or omission was in furtherance of the agreed plan to accomplish the object of the conspiracy. The conspiracy agreement, if any, need not plan or design each overt act. The overt act is any act or omission after the conspiracy agreement, whether agreed upon or not, that implements and furthers one or more of the manner, ways, means, methods and one or more of the objects of the conspiracy agreement.

The overt act or acts alleged in count one (1) of the Indictment as effecting the object of the alleged conspiracy must be one independent of the alleged conspiracy and agreement. The alleged overt acts must not be one of a series of acts constituting the agreement or conspiracy but such overt act or acts must be a subsequent independent act or acts or omissions following the alleged completed agreement or conspiracy and done to carry into effect the object of the alleged agreement or conspiracy. However, you may consider evidence, if any, of the overt acts of a defendant alleged in count one (1) of the Indictment and evidence, if any, of any other overt acts of the same defendant, if any, even though not alleged in count one (1) of the Indictment, together with all of the evidence pertaining to such defendant in determining whether or not such defendant first entered into an express of implied agreement of conspiracy and the terms

thereof as charged in count one (1) of the Indictment before the alleged commission of any one, or more or all of the overt acts alleged in count one (1) of the Indictment, that is to say, you are not to consider the overt act or omission and statement, if any, committed by one defendant in determining the membership of another defendant.

The alleged conspiracy agreement, if any, the alleged overt acts, if any, as well as the other essential elements and facts charged in count one (1) of the Indictment may be proved by direct and/or circumstantial evidence. These two (2) types of evidence have been explained elsewhere in these instructions.

With respect to count one (1) of the Indictment, you should first determine from the evidence beyond a reasonable doubt, whether or not, the agreement of conspiracy existed as alleged in the Indictment and if so which of the defendants and/or any unknown persons, if any, knowingly and wilfully became a member or members thereof while it existed. If you find from the evidence beyond a reasonable doubt that the conspiracy was knowingly and wilfully formed as alleged in count one (1) of the Indictment; and that two (2) or more, or all of the conspirators became a member thereof at its inception or thereafter and before termination of the alleged conspiracy; and that thereafter one or more of the members of the conspiracy committed, in furtherance of one or more of the alleged objects or purposes of such conspiracy, one or more of the overt acts charged in count one (1) of the Indictment; then I instruct you that it is not necessary for the United States of America to prove that the alleged conspirators accomplished the alleged objects or purposes. It is immaterial to count one (1) whether or not

the alleged conspirators were successful or failed to accomplish their alleged common objects or purposes.

There are no degrees of guilt of conspirators, they are all equal irrespective of their intelligence, duties, or degree of participation in the offense.

The proof of the conspiracy offense as charged in count one (1) of the Indictment is complete, if you find from the evidence beyond a reasonable doubt that the conspiracy existed as charged in count one (1) of the Indictment, and that during its existence one or more of the overt acts alleged was knowingly done by one of the conspirators in furtherance of one or more of the alleged objects or purposes of the conspiracy as charged by count one (1) of the Indictment; and it is complete as to every defendant found by you from the evidence beyond a reasonable doubt to have been knowingly and wilfully a member of the conspiracy at the time such overt act was committed, regardless of which of the conspirators did the overt act. The theory of count one (1) of the Indictment is that the conspiracy was completed upon the commission of any one of the alleged overt acts but that the conspiracy continued thereafter.

If you find that there were two (2) or more conspiracies, you must determine from the evidence beyond a reasonable doubt whether or not the specific conspiracy, of on or about October 31, 1969, as charged in count one (1) of the Indictment has been proved. If the specific conspiracy as charged in count one (1) has not been proved, you should acquit the defendants even though you find conspiracies other than that charged in count one (1) of the Indictment. Two (2) or more of the defendants must be members of the specific charged conspiracy in count one (1) and their membership in another conspiracy will not warrant their conviction of the charged

conspiracy in count one (1). If you find part of the defendants were members of a conspiracy and the other defendants were members of another conspiracy and both of which conspiracies had the identical essential elements and facts of the conspiracy as alleged in count one (1) of the Indictment and you further find that the specific conspiracy of two or more of the defendants as charged in count one (1) has not been proved beyond a reasonable doubt, then you should acquit the defendants for the reason that you cannot under the charges of count one (1) find part of the defendants guilty of one conspiracy and the other defendants guilty of the second conspiracy in one (1) verdict on count one (1) of the Indictment. However, if you find that the specific conspiracy of on or about October 31, 1969, charged in count one (1) existed beyond a reasonable doubt in addition to the other identical conspiracy, you must determine the guilt or innocence of the defendants in the charged conspiracy.

I have told you in another instruction that before you can find the defendants guilty or not guilty of any count of the Indictment that your verdict must be unanimous. Count one (1) charges seven (7) overt acts and that the conspiracy had the objectives of the described felonies. It is necessary that you follow the instruction of a unanimous verdict even to the extent that you must unanimously agree upon one (1) of the overt acts as charged in count one (1) of the Indictment; by way of example, it is not unanimous if part of the jury find that only overt act number one (1) was committed in execution and furtherance of the alleged conspiracy and the balance of the jury do not agree on such overt act but the balance of the jury find the rest of the overt acts were committed in execution and furtherance of the alleged conspiracy; and you must unanimously agree upon the felony objectives as charged.

5 Discussion during disposition hearing (Tr. 1380-81)

John P. Donner [John Michael Donner's father]: All I can say is that Mike wasn't there. He told me that. He never lied to me before; I believe him.

That's all I have to say, sir.

The Court: Well, so you understand, the jury may believe that too.

But so that the father and mother don't find fault with the law and the jury system—I am sure Mr. Sherwin will bear this out—that as was pointed out in the argument here, he didn't have to be down here for this. You understand that?

Mr. Donner: Yes, sir.

The Court: If the idea was concocted someplace else earlier, and he was a part of that conspiracy, if only one of them came down here and actually did the destruction then the rest of them that were in the conspiracy would be obligated, you see. It's the same thing like this business of "You hold my coat", you understand.

That's the explanation of how—maybe your son don't understand that; I don't know. Maybe he wasn't down here. I don't think that the jury had to find that—so that you understand it.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-98
JOHN MICHAEL DONNER, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5106
CONNIE GRUBBS MCNAMARA, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5119
PAUL JOSEPH MACK, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5120
ROBERT MARTIN MCNAMARA, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5121
JAMES DAVID WILLIAMS, PETITIONER
v.
UNITED STATES OF AMERICA

No. 74-5138
JANE ANNE KENNEDY, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, in various combinations, contend: (1) that their convictions under constitutional statutes may have been irreparably tainted by the submission to the jury of a count charging a violation of a statute later held unconstitutional; (2) that statements made during a press conference were inadmissible because they postdated all other overt acts of the conspiracy and did not show specific intent sufficient to inculpate the participants; (3) that the prosecutor made improper remarks; and (4) that trial counsel's performance was inadequate representation of petitioner Mack.

After a jury trial in the United States District Court for the Southern District of Indiana, petitioners were convicted of one count (Count 1) of conspiring, in violation of 18 U.S.C. 371, to destroy public records, in violation of 18 U.S.C. 2071, to interfere with the administration of the Military Selective Service Act in violation of 50 U.S.C. App. 462(a), and of three counts (Counts 2, 3 and 4) of violations of 18 U.S.C. 1361, and 2071 and 50 U.S.C. App. 462(a), respectively. Each was sentenced to concurrent terms of four years' imprisonment on Counts 1, 3 and 4 and fined $5,000 on Count 2. The court of appeals reversed the Count 4 convictions for the Section 462(a) substantive count, but otherwise affirmed (497 F. 2d 184; Pet. App. A).[1] A timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 10, 1974. The petitions for writs of certiorari in Nos. 74-98 and 74-5106 were filed on August 9, 1974; the petitions in Nos. 74-5119, 74-5120 and 74-5121 were filed on August 12, 1974; the petition in No. 74-5138 was filed on August 13, 1974. The latter four petitions are therefore out of time under Rule 22(2) of the Rules of this Court. In any event these cases do not warrant plenary review.

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[1]"Pet. App." refers to the appendix in No. 74-98.

The evidence showed that the Marion County, Indiana, office of the Selective Service System was vandalized by individuals who extensively destroyed records. A statement affixed to the office door identified the perpetrators as the "Beaver 55." Three weeks later petitioners held a news conference at which a statement signed by each was distributed and read aloud; in the statement petitioners identified themselves as the "Beaver 55" and claimed responsibility for the vandalism.[2] During the ensuing question period all petitioners except Connie Grubbs McNamara (petitioner in No. 74-5106) answered questions or volunteered statements (see Pet. App. A, pp. 3a-6a).

1. The court of appeals reversed petitioners' convictions on Count 4, the substantive count under Section 462(a), because *United States* v. *Baranski*, 484 F. 2d 556 (C.A. 7), had held the prohibition against hindering or interfering with the administration of the Selective Service Act "by force or violence or otherwise" unconstitutional; "or otherwise" included protected speech and conduct (see Pet. App. A, pp. 9a-10a). The panel below held that *Baranski* did not require reversal of the conspiracy count in this case, however, because that count charged a conspiracy to violate Section 2071 as well as Section 462(a) and petitioners, unlike the defendants in *Baranski*, were convicted of substantive violations of

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[2]Two other individuals signed the statement and participated in the press conference. They were tried and convicted with petitioners. One has since died and the other is a fugitive.

the constitutional statute (Pet. App. A, pp. 7a-9a). The court consequently thought it evident that petitioners' conviction on the conspiracy count rested on a finding by the jury that the conspirators had engaged in the overt acts that also supported the affirmed substantive conviction. Petitioners urge in various ways that their convictions nevertheless were infected by the submission of Count 4 to the jury.

(a) The trial court's instructions permitted the jury to find that the press conference was part of a continuing conspiracy—which had among its purposes propaganda and incitement—to violate Section 462(a). Petitioners therefore contend that *Baranski* compels reversal of the conspiracy count because they may have been convicted on the basis of an unconstitutional statute. We believe this argument was answered adequately by that portion of the court of appeals' opinion summarized (Pet. App. A, pp. 7a-10a).

(b) Petitioners nevertheless urge that *Street* v. *New York*, 394 U.S. 576, 578, and *Stromberg* v. *California*, 283 U.S. 359, require reversal because any conspiracy entailing both unlawful and protected acts creates the possibility that the jury may have convicted solely on the protected speech and conduct. Unlike petitioners' contention based on *Baranski*, which struck down Section 462(a) on its face, this line of argument requires the Court to agree that petitioners engaged in protected speech. We submit that petitioners' press conference was not "protected" speech but was a confession to past acts of criminal vandalism. A confession does not become protected because interwoven with a political justification of the crime and with advocacy of future acts of vandalism. The cases cited by petitioners deal with abstract calls

to political change; they are inapplicable to confessions of concrete criminal acts, and to the advocacy of additional acts similar to the vandalism to which petitioners confessed at their press conference. Cf. *United States* v. *Spock*, 416 F. 2d 165, 171 (C.A. 1) (First Amendment does not protect statements calling for commission of a specific crime). Because the utterances were not protected, the jury was permitted to consider them for whatever relevance they may have had to the substantive counts, and for what they may have shown about the intent of the conspirators and the scope of agreement under the conspiracy count.

(c) Petitioners' contention that a *Pinkerton* charge —permitting the jurors to attribute certain overt acts of one conspirator to another for purposes of the substantive offenses—allowed improper cross-use of evidence on the various counts, or alternatively that *Pinkerton* v. *United States*, 328 U.S. 640, 647-648, was disregarded by the courts below (Donner Pet. No. 74-98; compare p. 13 with pp. 14-15), is not persuasive. No *Pinkerton* charge was given. See Pet. App. A, pp. 12a-15a. The jury could have used the evidence for improper purposes, or against defendants whom it did not concern, only if it ignored the district court's careful limiting instructions.

2. Petitioners also argue that, under the *strictissimi juris* rule enunciated in *Spock* (see 416 F. 2d at 172-173, 178-179), their attendance at the press conference and joint signing of the prepared statement read and distributed at that conference were insufficient to establish their specific intent to adhere to the criminal purposes of the conspiracy. This argument is inapplicable to the instant case. Petitioners Connie Grubbs McNamara (who was silent at the press

conference) and Mack made extrajudicial statements admitting actual participation in the incursion into the Selective Service office (see McNamara Pet. No. 74-5106 at 4, 13, n. 3; Pet. App. A, p. 15a (Mack)). Petitioner Connie Grubbs McNamara's statement that she had participated in a "draft action in Indiana" was an admission of specific conduct[3] and not a "generalization" such as the one by a defendant in *Spock* that he would "do 'anything' asked to further opposition to the war." 416 F. 2d at 178.

In any event, the specific intent of each petitioner was sufficiently established by the signed, prepared statement and by the appearance at the press conference. The prepared statement did not, like the "Call to Resist Illegitimate Authority" in *Spock*, merely express approval and moral support for unlawful actions undertaken by others, 416 F. 2d at 174, so that signing it would not necessarily show the commission of criminal acts. The statement in this case identified its signers as the "Beaver 55," the perpetrators of a specific act, and "claimed responsibility" for the vandalism, which was offered as an example for others to follow.

Signing the statement also demonstrated an intent to adhere to the statement's advocacy of imitative acts of vandalism by others. It is not significant that two of the signers were silent at the press conference. Presence, as a signatory and as one of the sponsors of the conference, was sufficient evidence of adherence to the plan.

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[3]The credibility of the witness reporting the statement was a matter for the jury to determine.

3. Petitioner Connie Grubbs McNamara contends (Pet. No. 74-5106, p. 18) that the prosecutor should not have argued to the jurors that if they accepted defense counsel's theory of the case they would be "joining the conspiracy; he is asking you to join the conspiracy of the Beaver 55." The prosecutor's language may have been an oratorical excess, but it did not deprive petitioners of a fair trial. The prosecutor's remarks cannot be read as a threat to indict or otherwise punish the jurors if they returned a verdict of not guilty, nor were the jurors threatened with the opprobrium of their neighbors, as in *Lowdon* v. *United States*, 149 Fed. 673, 678 (C.A. 5). Nor did the prosecutor seek to "arouse passion and prejudice" against petitioners by a "wholly irrelevant" appeal to wartime sentiments, as in *Viereck* v. *United States*, 318 U.S. 236, 247-248.

4. Petitioner Mack claims that he was denied the effective assistance of counsel because, he asserts, the lead trial counsel who jointly represented all petitioners adopted trial tactics which were favorable to his co-defendants but injurious to him. However, this is not a case like *Glasser* v. *United States*, 315 U.S. 60, in which a defendant against whom the case was not a strong one objected to the appointment of his retained counsel to represent a co-defendant. All defendants, including petitioner Mack, initially had retained two local attorneys to represent them jointly; the lead attorney, from out of state, appeared on the first day of trial and told the court that he would represent petitioner as well as the other defendants. The trial judge then interrogated petitioner, who stated that he wished the attorney to represent him, that he had conferred and had sufficient consultation

with the attorney, and that he was ready for trial and did not want a continuance. Having voluntarily chosen joint representation, petitioner cannot now claim that it was prejudicial to him.

Moreover, petitioner Mack has not demonstrated a conflict of interest between himself and his co-defendants. He was the apparent leader of the group and chaired the press conference and read the prepared statement. He was not implicated by a co-defendant's confession, as in *Sawyer* v. *Brough*, 358 F. 2d 70 (C.A. 4); and he implicated himself by a statement he made on a radio talk show (see Pet. App. A, p. 15a). Although petitioner Mack now contends that his counsel's conduct was one of "harassment and ridicule" as to him (Pet. No. 74-5119, p. 2), the court of appeals found, after examination of the record, that the disparaging remarks were made only in bench colloquies out of the presence of the jury and that they amounted to "honesty and forthright recognition of clearly established facts" which "may well as a matter of trial strategy provide a better defense than a dissimulative distortion of that which is patent and virtually beyond argument" (Pet. App. A, pp. 18a-19a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

DOJ-1974-11